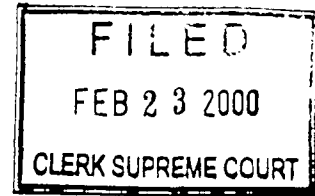


IN THE COURT OF APPEALS OF IOWA

No. 1999-609 (9-870) / 99-860
Filed February 23, 2000



**IN THE INTEREST OF A.M. and S.M.,
Minor Children,**

L.M., Mother,

Appellant.

Appeal from the Iowa District Court for Clinton County, Arden J. Van Zee,
Juvenile Court Judge.

Mother appeals following the termination of her parental rights to her two
daughters. **AFFIRMED.**

Carrie E. Long of Carrie E. Long Law Offices, P.C., Davenport, for appellant.

Thomas J. Miller, Attorney General, Diane Stahle, Special Assistant Attorney
General, and Ross Barlow, Assistant County Attorney, for appellee-State.

Heard by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

VAITHESWARAN, J.

Lisa appeals the termination of her rights to parent Autumn and Sarah. She contends: (1) the district court erred in terminating her rights under Iowa Code section 232.116(1)(e) because the children were no longer at risk of adjudicatory harm; (2) termination was not in the best interests of her children; and (3) her second of three attorneys was ineffective. We affirm.

I. Background Facts and Proceedings

Lisa and Steve are the parents of Autumn, born on October 11, 1991, and Sarah born on March 3, 1993. The family first came to the attention of the Department of Human Services in 1995, after Steve struck Sarah in the course of hitting Lisa, causing Lisa to drop her cigarette on Sarah. A chemical dependency evaluation of Steve revealed alcohol, marijuana, and cocaine abuse.

In September 1996, Autumn was hospitalized for psychiatric treatment after she displayed persistent tantrums, crawled into a ball at school, and expressed fear her school troubles would lead to domestic violence at home, when her father found out. Autumn also reported she had been sexually abused by another child. Autumn was diagnosed with possible reactive attachment disorder of infancy, attention deficit hyperactivity disorder, lead toxicity, and learning disorder. Therapists expressed concern that Autumn's behavior was influencing Sarah, who also had begun throwing tantrums at home.

On March 6, 1997, the juvenile court adjudicated Autumn and Sarah children in need of assistance. Following a dispositional hearing in April, the court ordered the children to remain with their parents, subject to supervision by the Department. Two months later, the court entered an ex parte order requiring Steve to have no

contact with the children, in light of his continued substance abuse and domestic violence. The court placed the children in the sole custody of their mother, but later transferred custody of the children to the Department, for placement in foster care. At a hearing to review the ex parte removal order, the parties stipulated to leaving the children in the temporary custody of the Department.

On November 19, 1998, the State filed a petition to terminate Lisa and Steve's parental rights. On May 5, 1999, the juvenile court terminated their rights to parent Autumn and Sarah. Lisa appealed. The Iowa Supreme Court granted a motion for limited remand to permit the court to consider additional reports covering the period preceding termination. The juvenile court considered the reports, then affirmed its prior termination.

II. Standard of Review

The scope of review in termination cases is *de novo*. *In re J.L.W.*, 570 N.W.2d 778, 780 (Iowa App. 1997). The grounds for termination must be proven by clear and convincing evidence. *In re E.K.*, 568 N.W.2d 829, 831 (Iowa App. 1997).

III. Iowa Code section 232.116(1)(e)

The district court relied on Iowa Code section 232.116(1)(e) (1997) in terminating Lisa's rights to parent Autumn and Sarah. That section authorizes termination if all the following elements are satisfied:

- (1) The child is four years of age or older.
- (2) The child has been adjudicated a child in need of assistance pursuant to section 232.96.
- (3) The child has been removed from the physical custody of the child's parents for at least twelve of the last eighteen months, or for the last twelve consecutive months and any trial period at home has been less than thirty days.

(4) There is clear and convincing evidence that at the present time the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Lisa contends the State failed to present clear and convincing evidence that the children would still be considered children in need of assistance if returned to the mother's care. See Iowa Code § 232.116(1)(e)(4). We disagree.

Criteria considered in deciding whether children should be removed from the home are also considered in determining whether the children should be returned to the home. *In re C.K.*, 558 N.W.2d 170, 173 (1997). The children were adjudicated in need of assistance under Iowa Code sections 232.2(6)(c)(1) (mental injury caused by acts of parents), (f) (need for treatment to cure serious mental illness, disorder or emotional anxiety), and (n) (parent's mental condition, imprisonment or drug or alcohol abuse prevented children from receiving adequate care). There is no question those statutory grounds continued to exist at the time of termination. See *In re M.W.*, 458 N.W.2d 847, 850 (Iowa 1990).

Therapists and medical personnel repeatedly suggested the children required a stable, less chaotic environment to address the problems resulting from long term exposure to domestic violence. Although Lisa had divorced Steve by the time of the termination hearing, there was little evidence to suggest she could independently deal with the severe emotional problems of her children. After the children were removed from her care in June 1997, Lisa had no unsupervised contact with them. During a supervised visit less than one week before the termination hearing, the children refused to play unless the social worker was included, and Autumn had difficulty maintaining control of herself. Lisa addressed the behavior, but Autumn "kept pushing limits." The worker testified that this pushing of limits occurred more

when the children were around Lisa than when they were around other people. She conceded Autumn exhibited the same sort of behavior toward her foster mother, but suggested Autumn was continuing to model her behavior on what she had seen in her parents' home. She noted Lisa had trouble supervising her children, focusing on one to the exclusion of the other. On two occasions Autumn ran out of a room and toward a street.

Lisa also argues termination is not warranted because she now has a stable spouse, Ron, who can assist in the children's care. However, as the State points out, Lisa herself advised the Department that Ron would not assist Lisa with learning parenting techniques, stating, "I'm just doing it on my own." As the juvenile court noted, Lisa's request to involve Ron came "on the eve of the termination case." The court concluded "the time for permanency is at hand."

We conclude there is clear and convincing record evidence to support the juvenile court's finding that the children could not be returned to Lisa and to support termination under Iowa Code section 232.116(1)(e).

IV. Best Interests

Even if the statutory requirements for termination of parental rights are met, the decision to terminate must still be in the best interests of the children. *In re M.S.* 519 N.W.2d 398, 400 (Iowa 1994). In determining a child's best interests, we look to the child's long-range and immediate interests. *In re C.K.*, 558 N.W.2d at 172. "We consider the physical, mental, and emotional condition and needs of the child in deciding whether to terminate parental rights." *In re C.W.*, 554 N.W.2d 279, 282 (Iowa App. 1996). We consider what the future likely holds if the children are returned to their parents. *In re A.R.S.*, 480 N.W.2d 888, 890 (Iowa 1992). Parents'

past performance may be indicative of the quality of the future care the parent is capable of providing. *In re C.W.*, 554 N.W.2d at 283.

Lisa contends the court should not have terminated her rights because the Department could not assure permanence through adoption. We disagree.

The State correctly points out that adoptability of the children is not a factor in deciding whether a parent's rights should be terminated. *In re T.C.*, 492 N.W.2d 425, 429 (Iowa 1992). Our courts have repeatedly stated that difficulty in finding an adoptive home for children with serious emotional problems is not sufficient reason for refusal to terminate the parent-child relationship. See *In re S.O.*, 483 N.W.2d 602, 604 (Iowa 1992); *In re D.P.*, 465 N.W.2d 313, 316 (Iowa App. 1990).

It is true the children were in their fourth foster home at the time of the termination hearing and their foster mother was having substantial problems controlling Autumn. However, we are not convinced the solution is to return the children to Lisa. The record reveals the children's dysfunctional behavior is a product of their extremely turbulent home environment with Lisa and Steve. Although Lisa has since distanced herself from the primary source of that turbulence, our de novo review of the record suggests she is not capable of addressing the children's dysfunction on a long-term, independent basis. Accordingly, we conclude termination of Lisa's parental rights is in the best interests of Autumn or Sarah.

V. Ineffective Assistance of Counsel

Lisa contends her second attorney was ineffective in failing to inform her she had a right to a hearing prior to issuance of a removal order and in failing to advise her she could request additional services of the Department. In termination cases,

we generally apply the same test for determining whether counsel was ineffective as would be applied in criminal proceedings. *In re A.R.S.*, 480 N.W.2d at 891. In order to establish counsel was ineffective, a parent must show: "(1) counsel's performance is deficient; and (2) actual prejudice resulted." *Id.*

We conclude counsel's performance at the removal proceeding was not deficient. Lisa was present at every hearing. Although she maintains she did not understand the meaning of a stipulation, the record reveals she entered into a stipulation to have the children remain in her temporary custody just two weeks before the removal hearing. As for Lisa's claim she was not advised of her right to request additional services, the record suggests the contrary. Additionally, the Department offered her joint counseling with her daughters, the only service Lisa testified she would have requested had she been given the opportunity. However, these sessions were discontinued after the children became too agitated. For these reasons, we reject Lisa's ineffective assistance of counsel claim.

The termination of Lisa's rights to parent Autumn and Sarah is affirmed.

AFFIRMED.